

1 mentions that UNEs can be used for interconnection. The opening sentence in Attachment 11 §

2 1.3 says that:

3 SWBT will allow CLEC to use the same physical facilities (e.g., dedicated
4 transport access facilities, dedicated transport UNE facilities) to provision trunk
5 groups that carry Local, intraLATA and interLATA traffic, provided such
6 combination of traffic is not for the purpose of avoiding access charges, and
7 facility charges associated with dedicated transport used to carry interLATA and
8 intraLATA traffic originated by or terminated to a customer who is not CLEC
9 local exchange service customer.

10 See also Attachment 11 ITR § 1.4.

11 AT&T's refusal to allow UTEX to use the UNE it ordered in Midland for interconnection
12 was a breach of the ICA. We ultimately had to use other means to interconnect, but it caused
13 delay and extra expense.

14 **Q: IS THERE A REMEDY IN ATTACHMENT 17 FOR THIS BREACH?**

15 A: UTEX believes there should be some Attachment 17 measurement or liquidated damages
16 relief for AT&T for AT&T's AT&T's purposeful, malicious, willful and intentional failure and
17 refusal to allow UTEX to use a UNE it had ordered, received and paid for to also affect
18 interconnection. But if the Arbitrators hold there is none, then recompense for the damages
19 AT&T has imposed on UTEX must occur through regular contract damages approaches, in a
20 court of law.

15	Requiring of UTEX to obtain unnecessary numbering resources before accepting an interconnection order.
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21 **Q: DID AT&T REQUIRE UTEX TO OBTAIN UNNECESSARY NUMBERING**
22 **RESOURCES BEFORE ACCEPTING AN INTERCONNECTION ORDER.**

23 A: Yes. In the Corpus Christi LATA, for example, AT&T would not accept an
24 interconnection order based on the fact that the LRN UTEX used was associated with the

1 Kingsville rate center. AT&T would not interconnect for "Corpus Christi" traffic until UTEX
2 obtained numbers associated with rate centers that were in the Corpus Christi local calling area
3 and then provided a number in that NPA-NXX as UTEX' LRN..

4 **Q: DID THIS CAUSE DELAY?**

5 A: Yes. We next tried to get Corpus Numbers. All we could secure was a thousands block
6 and use one of those numbers as the LRN. Since we already had numbering resources in the
7 Corpus Christi LATA we could not get an entire new code merely to use it as an LRN. AT&T
8 rejected again, causing further delay. This time they said that use of a number within a thousands
9 block would not work. Instead, we had to be the code holder for the entire NXX block. Of
10 course, NANPA would not give us an entire code.

11 **Q: DID THIS CAUSE FURTHER DELAY?**

12 A: Yes.

13 **Q: DID THIS CAUSE FINANCIAL HARM TO UTEX AS A RESULT OF THE**
14 **DELAY?**

15 A: Yes.

16 **Q: IS THERE ANY PROVISION IN THE ICA THAT REQUIRES YOU TO BE THE**
17 **CODE HOLDER FOR AN NPA/NXX BLOCK BEFORE YOU CAN USE A NUMBER IN**
18 **THAT BLOCK AS AN LRN?**

19 A: Not that I can find.

20 **Q: IS THERE ANY PROVISION IN THE ICA THAT REQUIRES YOU TO SUPPLY**
21 **AN LRN WITHIN A NPA/NXX ASSOCIATED WITH THE RATE CENTER IN WHICH**
22 **THE AT&T TANDEM IS LOCATED WHEN YOU WISH TO ESTABLISH**
23 **INTERCONNECTION WITH THAT TANDEM?**

1 A: I do not see that in any part of the ICA.

2 Q: DOES THE ICA HAVE ANY PROVISION THAT WOULD ALLOW AT&T TO
3 REFUSE TO INTERCONNECT BASED ON AN OBLIGATION NOT SET OUT IN THE
4 ICA?

5 A: I am not aware of any such provision.

6 Q: IS THERE A REMEDY IN ATTACHMENT 17 FOR THIS BREACH?

7 A: UTEX believes there should be some Attachment 17 measurement or liquidated damages
8 relief for AT&T' purposeful, malicious, willful and intentional failure and refusal to interconnect
9 unless and until UTEX fulfills some requirement that is not set out in the ICA as a result of §§
10 1.1.4.2, 1.1.4.3, 1.1.4.4.8, 2.1-3.1, 4.1 and 6.4. But if the Arbitrators hold there is none,
11 recompense for the massive damages AT&T has imposed on UTEX must occur through regular
12 contract damages approaches, in a court of law..

16	Requiring of UTEX to obtain unnecessary SS7 point codes before accepting an interconnection order.
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13 Q: IS THIS ISSUE STILL ONE THAT MUST BE RESOLVED?

14 A: AT&T is not presently requiring UTEX to obtain multiple SS7 point codes when fewer
15 will do. If AT&T will agree that it will continue its current practice of allowing UTEX to use the
16 same point code throughout the state for all locations, this issue need not be further addressed.

17	Refusal to accept an interconnection order until consenting to the content of a network diagram that imposed obligations not set out in the ICA.
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17 Q: DOES AT&T REQUIRE AN "APPROVED" NETWORK DIAGRAM BEFORE IT
18 WILL ACCEPT AND PROVISION INTERCONNECTION ORDERS?

19 A: Every time. Without fail.

1 Q: DOES AT&T IMPOSE REQUIREMENTS OR LIMITATIONS AS PART OF
2 THIS PROCESS THAT ARE NOT RELATED TO SPECIFIC ICA PROVISIONS?

3 A: Usually.

4 Q: PLEASE GIVE ME SOME EXAMPLES?

5 A: I address several examples in other parts of this section. AT&T required UTEX to obtain
6 new numbers in Corpus Christi before it would "approve" the NIT diagram. AT&T Texas would
7 not agree on the topology to be reflected on the diagram for Dallas. We had serious issues in
8 Lubbock. AT&T will not "allow" UTEX to submit facilities orders to start physical
9 interconnection (any orders sent in are rejected) unless there is a signed NIT diagram. They will
10 not sign a diagram unless the CLEC agrees to what AT&T wants. AT&T takes control of the
11 interconnection process and often forces the CLEC to waive rights. Carriers want to get started
12 and delay can cause serious harm. AT&T has the leverage and they use it.

13 Q: DOES THE ICA HAVE ANY PROVISION THAT WOULD ALLOW AT&T TO
14 REFUSE TO INTERCONNECT BASED ON A REFUSAL BY UTEX TO WAIVE
15 RIGHTS UNDER IN THE ICA?

16 A: I am not aware of any such provision.

17 Q: IS THERE A REMEDY IN ATTACHMENT 17 FOR THIS BREACH?

18 A: UTEX believes there should be some Attachment 17 measurement or liquidated damages
19 relief for AT&T purposeful, malicious, willful and intentional failure and refusal to interconnect
20 unless and until UTEX fulfills some requirement or accepts some limitation that is not set out in
21 the ICA as a result of §§ 1.1.4.2, 1.1.4.3, 1.1.4.4.8, 2.1-3.1, 4.1 and 6.4. But if the Arbitrators
22 hold there is none, recompense for the massive damages AT&T has imposed on UTEX must
23 occur through regular contract damages approaches, in a court of law.

18	Turning down interconnection facilities and trunks pending 911 testing.
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1 Q: DOES THE ICA ALLOW AT&T TO TURN DOWN INTERCONNECTION
2 FACILITIES AND TRUNKS – AND TO NOT ALLOW TRAFFIC TO FLOW – UNLESS
3 UTEX HAS COMPLETED 911 TESTING AND PRESENTS AT&T WITH A
4 CERTIFICATION BY THE 911 AUTHORITIES?

5 A: This very issue was litigated in Docket 29944. The Award in that case held AT&T could
6 not refuse to exchange traffic in an attempt to be a private 911 enforcement authority. See
7 Docket 29944 Award, p. 32:

8 ***Arbitrators' Decision***

9 *The Arbitrators find that SBC Texas cannot "turn down" SS7 Interconnection*
10 *Trunks due to UTEX's failure to satisfy its purported 911-related obligations or*
11 *conditioned upon UTEX's executing a data-only amendment. Additionally, SBC*
12 *Texas should allow UTEX to pass data-only traffic that does not require the*
13 *capability of an end-user to dial 911 to reach an emergency service provider over*
14 *the interconnection trunks without requiring 911 agency approval. The*
15 *Arbitrators agree with UTEX that a CLEC's obligation to provide 911*
16 *functionality is required, only to the extent it is providing a service for which 911*
17 *connectivity is required. Therefore, if a CLEC is providing a data-only service*
18 *that does not require the transmission of 911 calls, then 911 agency compliance*
19 *becomes unnecessary because the 911 agencies have no jurisdictional authority*
20 *over these services. The Arbitrators are sympathetic to SBC Texas's concerns of*
21 *potentially being held liable for 911 calls originated from a CLEC end user that*
22 *are not terminated properly because the CLEC failed to satisfy its 911*
23 *obligations. However, the Arbitrators find that there are no specific provisions in*
24 *the ICA or the law that require UTEX to demonstrate that it has implemented 911*
25 *capabilities before the interconnection trunks can be used to provide services that*
26 *do not require the transmission of 911 calls. Moreover, SBC Texas's "data only*
27 *amendment" is not appropriate to use because it is limited to one-way traffic and*
28 *UTEX's proposed data service is a two-way service. The Arbitrators find that the*
29 *ICA contains specific provisions related to the limitation of liability and*
30 *indemnification for the connection provided by SBC Texas between UTEX's local*
31 *switch and E911 Universal Emergency Number Service Customers that govern*
32 *the parties' concerns on those issues. In the event that UTEX begins to offer*
33 *voice services in conjunction with data-only services, it shall immediately comply*
34 *with all state and federal 911 rules and seek approval from the appropriate 911*
35 *agency.*

1 **Q: HAS AT&T CONTINUED TO VIOLATE THE ICA IN THIS MANNER?**

2 A: Yes. In January of 2006 they once again turned down interconnection trunks pending 911
3 testing. This occurred in the Midland LATA.

4 **Q: DID THIS CAUSE DELAY?**

5 A: Yes.

6 **Q: DID THE DELAY CAUSE HARM TO UTEX?**

7 A: Yes.

8 **Q: DID THE AWARD IN DOCKET 29944 ADDRESS RECOMPENSE TO UTEX**
9 **FOR AT&T' ACTIONS THAT WERE FOUND TO BE A BREACH?**

10 A: No. That is part of the purpose of this case. We request that the Commission find that the
11 breach was purposeful, malicious, willful and intentional, and allow us to recover damages in a
12 court of law for the occurrences both before and after Docket 29944.

13 **Q: IS THERE A REMEDY IN ATTACHMENT 17 FOR THIS BREACH?**

14 A: UTEX believes there should be some Attachment 17 measurement or liquidated damages
15 relief for AT&T' purposeful, malicious, willful and intentional failure and refusal to pass
16 interconnection related traffic unless and until UTEX fulfills some requirement or accepts some
17 limitation that is not set out in the ICA as a result of §§ 1.1.4.2, 1.1.4.3, 1.1.4.4.8, 2.1-3.1, 4.1
18 and 6.4. But if the Arbitrators hold there is none, recompense for the massive damages AT&T
19 has imposed on UTEX must occur through regular contract damages approaches, in a court of
20 law.

22

Refusal to provide dark fiber pre-ordering information in response to requests
submitted by UTEX after the Award in Docket 29944?

1 Q: HOW MANY TIMES HAS THE COMMISSION BEEN REQUIRED TO
2 INTERVENE AND FORCE AT&T TO HONOR ITS DUTIES REGARDING FIBER?

3 A: Waller Creek had to obtain PUC relief. Its successor El Paso Global (Alpheus) made
4 subsequent filings. UTEX did too. CoServ tried as well. The Docket 29944 Award observed:

5 *The Arbitrators note that this post-interconnection dispute on dark fiber*
6 *information and related issues, represents the fifth time that the same or similar*
7 *issues has been addressed by this Commission: P.U.C. Dockets 17922 and 20268*
8 *for the Waller Creek Arbitration; P.U.C. Docket 23396 for the CoServ*
9 *Arbitration; P.U.C. Docket No. 25004 for the EPN Arbitration; and P.U.C.*
10 *Docket No. 25188 for the Revised EPN Arbitration. To ensure finality with*
11 *respect to this repeated dispute on dark fiber inquiry, the Arbitrators address this*
12 *issue in a discrete manner.*

13
14 Q: DID YOU RECEIVE YOUR INFORMATION AFTER THE DOCKET 29944
15 AWARD?

16 A: The Docket 29944 Arbitrators thought they had finally resolved the issue, and expected
17 AT&T to comply. Their expectations were completely misplaced. AT&T never concedes or fully
18 complies because they know they will ultimately be able to just wear down the other side and
19 even the Commission. So, here it is the sixth time: UTEX never received the fiber information it
20 has sought for over 4 years. We know AT&T has that information. But when we sought it, again,
21 AT&T told us to fill out a form that mandates that the CLEC input information the CLEC does
22 not have at that stage or may not ever have. But without that information AT&T rejects the form.
23 AT&T will not provide a Business Objects Report drawn from the TIRKS database to UTEX.
24 Even after Docket 29944.

25 What I find most offensive is that AT&T personnel prepared a BOR. They just never
26 provided it. They instead chose to continue playing "deny, delay and deter." The internal
27 communications on this topic demonstrate how much bad faith and antipathy there is within
28 AT&T.

1 Q: DO YOU STILL WANT THE BOR?

2 A: We want the Commission to enforce the ICA.

3 Q: DO YOU BELIEVE YOU ARE ENTITLED TO DAMAGES FOR AT&T'
4 BREACH OF THE ICA AND THE REFUSAL TO ABIDE BY THE DOCKET 29944
5 AWARD?

6 A: Yes. We materially had to change our plans due to AT&T's refusal to honor the contract.

7 Q: IS THERE A REMEDY IN ATTACHMENT 17 FOR THIS BREACH?

8 A: UTEX believes there should be some Attachment 17 measurement or liquidated damages
9 relief for AT&T' purposeful, malicious, willful and intentional failure and refusal to provide this
10 dark fiber pre-order information and its knowing, purposeful refusal to abide by the Award in
11 Docket 29944. We believe Attachment 17 §§ 1.1.4.2, 1.1.4.3, 1.1.4.4.8, 2.1-3.1, 4.1 and 6.4
12 should be read to cover this activity. But if the Arbitrators hold that Attachment 17 does not
13 cover this activity, recompense for the massive damages AT&T has imposed on UTEX must
14 occur through regular contract damages approaches, in a court of law.

23	Failure to advise UTEX of AT&T's contention or belief it was not receiving CPN so the parties could "cooperatively work to correctly rate the traffic?"
24	Failure to "cooperatively work" with UTEX "to correctly rate the traffic?"

15 Q: WHY ARE THERE CPN-RELATED ISSUES THAT INVOLVE ATTACHMENT
16 17?

17 A: As before, we believe that AT&T breached the ICA and UTEX is entitled to either
18 liquidated damages or is allowed to apply regular contract damages approaches, in a court of
19 law. The answer cannot be that AT&T can flagrantly breach the ICA in multiple ways and then
20 win a ruling it bears no financially responsibility for the damages it caused.

1 UTEX addresses the CPN issues in other parts of the testimony. AT&T never advised
2 UTEX that AT&T was somehow not receiving CPN. UTEX was finally advised in the form of a
3 back bill for many months. Of course we now know that the main cause of the initial bill was
4 that AT&T's own network was failing to record. Regardless, AT&T's failure to advise UTEX that
5 AT&T was purportedly not receiving CPN was a breach of Attachment 12 § 2.4.

6 In addition, AT&T has not come close to making any attempt to "cooperatively work to
7 correctly rate the traffic." See § 2.4. AT&T has made up its own mind on how it will rate and
8 there has been absolutely no attempt to negotiate or cooperate so the parties could obtain a
9 "correct rating." The extent of AT&T's cooperation has been (1) deliver bills; (2) demand
10 payment and threaten disconnection; and (3) file a complaint. This is a breach. Mr. Lewis
11 describes in detail the numerous problems with these bills and how AT&T is really acting like a
12 bully and is refusing to obey the express terms of the ICA.

13 **Q: DID THE FAILURE TO NOTIFY AND COOPERATE CAUSE HARM TO**
14 **UTEX?**

15 A: Yes. Of course it did. It led directly to all the time, expense and trouble in this case. We
16 have been totally distracted from running the business for all this time. The entire thing has cost
17 us an immense amount of money. The billing itself and the ensuing risk has foreclosed any real
18 possibility of growth or expansion.

19 **Q: IS THERE A REMEDY IN ATTACHMENT 17 FOR THIS BREACH?**

20 A: UTEX believes there should be some Attachment 17 measurement or liquidated damages
21 relief for AT&T's purposeful, malicious, willful and intentional failure and refusal to abide by
22 Attachment 12 § 2.4 as a result of Attachment 17 §§ 1.1.4.2, 1.1.4.3, 1.1.4.4.8, 2.1-3.1, 4.1 and

6.4. But if the Arbitrators hold there is none, recompense for the massive damages AT&T has imposed on UTEX must occur through regular contract damages approaches, in a court of law.

25	Failure to provide measurements and reports relating to performance standards under Attachment 17?
27	Failure to self-report and directly provide credits or performance payments as a result of any breach identified in this case?

Q: ARE THERE ANY OTHER BREACHES YOU HAVE ASSERTED IN THIS CASE THAT ARE POTENTIALLY COVERED BY ATTACHMENT 17?

A: Yes. We assert that AT&T has not met the standards set out in Attachment 17 § 1.1.4.33, 9.4.6, 9.4.9 and 9.4.10 regarding timely, accurate and complete bills. See also Attachment 12 – Compensation.³⁰ Those deliverables have discrete and applicable performance measures and liquidated damages that apply when the required measures are not met. Mr. Lewis discusses the AT&T invoices in his testimony on other issues. But that testimony is equally applicable to this topic. AT&T' invoices are not accurate or complete. Plus, they routinely send charges for billing periods that have long passed.

We also assert that AT&T has not provided the reports that are required by 6.2. UTEX has never, ever, received any such report.

Finally, AT&T has never, ever paid UTEX a penny in liquidated damages for non-attainment of its performance standards. This violates 6.4. and should itself generate a separate liquidated damages payment.

26	Use of the T2A standards and measurements instead of the standards and measurements prescribed in the UTEX/AT&T ICA?
----	--

³⁰ 2.1 Each Party to this Agreement will be responsible for the accuracy and quality of its data as submitted to the respective Parties involved.

1 Q: HAS AT&T TAKEN ANY MEASUREMENTS OF ITS PERFORMANCE UNDER
2 THE UTEX ICA?

3 A: I do not know. They are supposed to give us reports. I have heard them say that some
4 information is available on a web site. We have never accessed that site because that is not how
5 our ICA works. The ICA does not say that AT&T is to post information on some web site. That
6 web site was created as part of the T2A and related proceedings. It has nothing to do with UTEX
7 or our ICA. Since AT&T allegedly lumps us in with the T2A CLECs we believe they may in fact
8 be using T2A measurements, rather than the measurements specific to our ICA. If they are doing
9 so it is a breach. But again, we have not looked and we will not look unless and until our ICA is
10 amended to reference web-based reports as the means by which AT&T complies with the
11 specific terms between UTEX and AT&T. AT&T continually tries to force us to adopt the T2A
12 or its successor. The one time we reached agreement with them to use some of the T2A terms
13 during one of the Docket 26621 fiascos, however, they almost immediately repudiated the deal
14 we had struck for reasons I still do not understand. But undeterred, AT&T just pretends that our
15 ICA is the T2A (or now, its successor). They have persuaded themselves that not only was
16 Docket 26381 never abated, it has been completed and they won on every single issue.

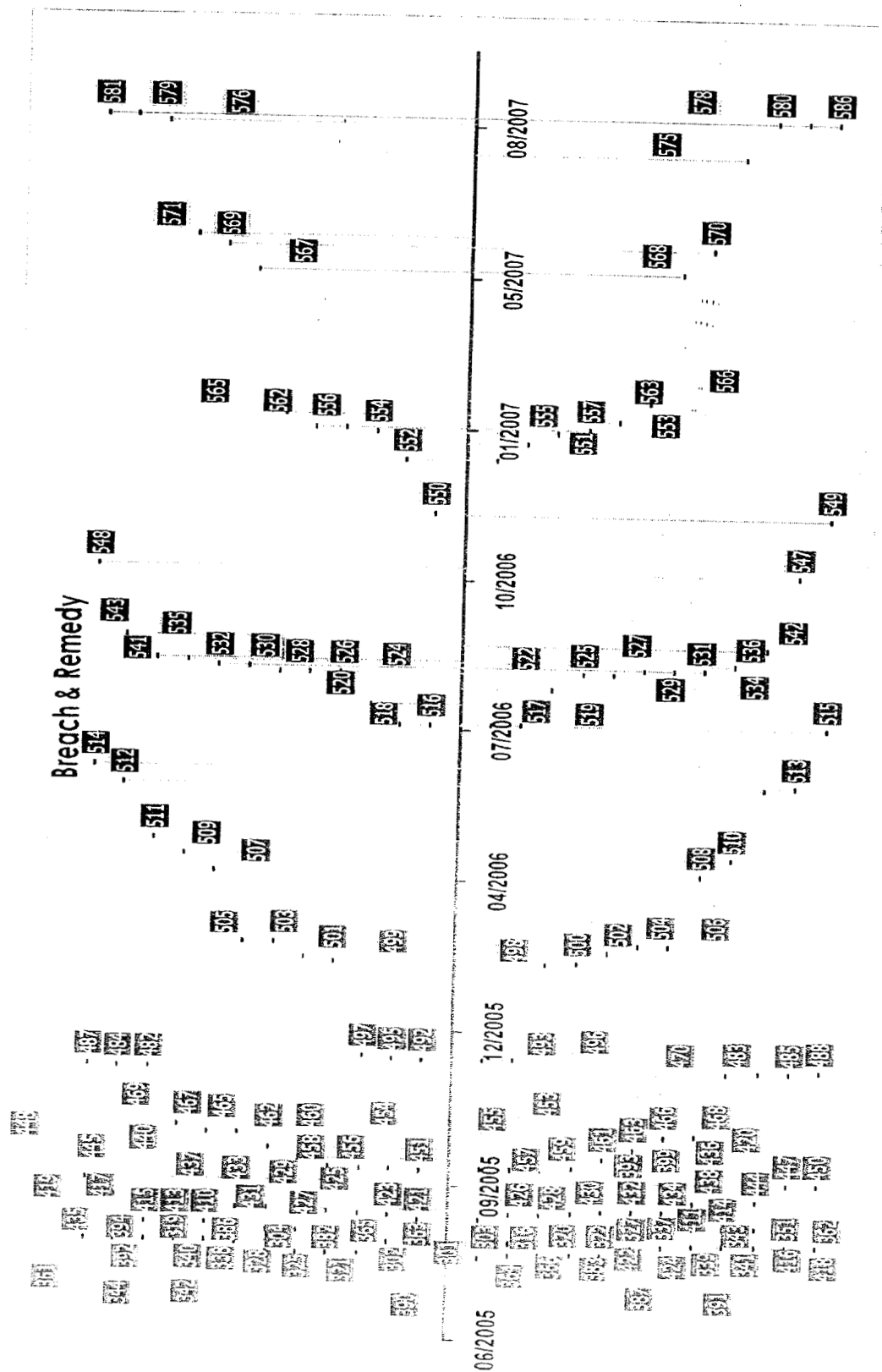
17 So it would not surprise me at all to learn that they have compiled some reports using
18 their bastardized interpretation of T2A standards, and put those reports with the rest of the T2A
19 CLEC reporting in some useless web site. As noted we've never received a dime. Just like most
20 CLECs. But this is not on account of superior performance. AT&T just bends all the rules past
21 the breaking point. In this regard we are not alone.

1 **Q: HAS AT&T BREACHED ITS DUTY TO ACT IN GOOD FAITH IN ITS**
2 **DEALINGS WITH UTEX?**

3 A: YES. We have documented and presented in all of our testimony a compelling showing
4 that AT&T has acted with complete disregard to its ICA duties and did so purposefully,
5 knowingly and with intent to harm. Below is a pictorial timeline showing some of the most
6 egregious bad faith actions by AT&T referencing the Exhibit number. Suffice it to say that good
7 faith is not in AT&T DNA and their genes are on full display. I have also included a voice mail
8 message from Mr. Larry Cooper. Bill Cole sent me to Larry as the highest ranking person inside
9 the SBC who could decide policy related to CPN and establishing a mutual CPN policy. This
10 voice mail indicates that AT&T would gather their policy and product folks and get back to me.
11 No policy or product information was provided in discovery, and Larry never got back to me
12 with any substantive proposal.

13 **Q: IS THERE A REMEDY IN ATTACHMENT 17 FOR THIS BREACH?**

14 A: UTEX believes there should be some Attachment 17 measurement or liquidated damages
15 relief for AT&T' purposeful, malicious, willful and intentional failure and refusal to abide by its
16 contract obligations in general and its contractual duty of good faith in particular. We believe this
17 breach should be covered by Attachment 17 §§ 1.1.4.2, 1.1.4.3, 1.1.4.4.8, 2.1-3.1, 4.1 and 6.4.
18 But if the Arbitrators hold there is none, recompense for the massive damages AT&T has
19 imposed on UTEX must occur through regular contract damages approaches, in a court of law.



1 **Section 6: Overarching Issues including Waiver**

29	Are AT&T's first and second claims time barred?
30	Has AT&T waived any right to assert its claims in either Docket 32041 or Docket 33323?
31	Are AT&T's claims barred by statutory and contractual limitations?
32	Are AT&T's claims barred under the doctrine of laches, equitable estoppel and/or waiver?
33	Are AT&T's claims barred by the doctrine of satisfaction and accord?
34	Are AT&T's claims barred by the equitable doctrine of unclean hands?
35	Are there one or more indispensable third parties who are necessary to the adjudication of issues in this proceeding?
36	Which IXCs, if any, have routed telephone toll traffic through UTEX's interconnection facilities so as to avoid switched access charges from AT&T?
37	Are these IXCs indispensable parties to this case?

2 **Q: WHEN DID AT&T FILE ITS COMPLAINT IN DOCKET 33323?**

3 A: October 6, 2006.

4 **Q: FOR WHAT PERIOD IS IT ASKING THE COMMISSION TO AWARD**
5 **DAMAGES IN THE FORM OF "NO CPN" AND "INTERLATA ACCESS" CHARGES?**

6 A: Frankly, I do not know how far back they are trying to go. We cannot completely discern
7 the actual periods for which they are attempting to recover or the nature of the individual charges
8 for each period. We only recently figured out that they had been billing us "no CPN" related
9 charges on multiple "ordinary access" BANs in addition to the single "no CPN" BAN. We
10 estimate that the bills go back to mid 2004.

11 GTC § 9.1.1 provides:

12 9.1.1 Except as otherwise specifically provided in this Agreement, no claims
13 will be brought for disputes arising from this Agreement more than 24 months
14 from the date the occurrence which gives rise to the dispute is discovered or
15 reasonably should have been discovered with the exercise of due care and
16 attention.

1 To the extent AT&T is seeking recovery of monies related to traffic that was passed prior
2 to October 5, 2004 then it cannot recover. But that is not the end of the story. AT&T was fully
3 aware of UTEX's position on both of the issues because UTEX communicated its position and
4 intent – on both “CPN” and “access” – before October 5, 2004. This is most clearly so with
5 regard to access charges. AT&T knew as early as December 8, 2003 (if not earlier) that UTEX
6 was asserting the applicability of the “no compensation for ESP traffic” in the context of VoIP.
7 Indeed, even AT&T will have to admit that it has known that this was the interpretation ever
8 since the original ESP no compensation provision was adopted through negotiations in 1999.

9 As to the “no CPN” issue, again, AT&T clearly knew in early 2002 that UTEX's
10 interpretation was that its contract duty with regard to CPN was met if it passed the information
11 it received from its customers. The parties were negotiating for a replacement agreement during
12 that time, and this interpretation was conveyed to AT&T. Additionally, I affirmatively
13 represented to Jerry Gilmore that number identification and representation had no impact on
14 rating or routing in May of 2004. Waiting over a year and then asserting back billing just can not
15 be allowed.

16 **Q: DID THE PARTIES CONDUCT ANY INFORMAL DISPUTE RESOLUTION ON**
17 **THESE ISSUES?**

18 **A:** Yes, prior to UTEX's complaint in Docket 32041.

19 **Q: DID AT&T RAISE THE “INTERLATA ACCESS” ISSUE DURING INFORMAL**
20 **DISPUTE RESOLUTION?**

21 **A:** No.

22 **Q: DID AT&T CONTEST OR TRY TO NEGOTIATE THE ISSUE OF WHETHER**
23 **UTEX's CUSTOMERS QUALIFY AS ESPs?**

1 A: No. AT&T never challenged whether our customers were or are ESPs. The first time we
2 officially came to understand AT&T wanted to contest whether our customers were really ESPs
3 was when they filed their complaint.

4 **Q: DO YOU BELIEVE AT&T HAS ACTED FAIRLY AND APPROPRIATELY IN**
5 **ITS RELATIONSHIP AND DEALINGS WITH UTEX?**

6 A: No. Not on the issues before the Arbitrators in this case. To the contrary, their hands are
7 far from clean. I am convinced that their purpose and goal is to drive us from the market so they
8 alone can set the terms and conditions upon which all new technology companies
9 intercommunicate with the PSTN. Their discovery production clearly shows that we have
10 become a "Marked CLEC." This is not really about their bills. It is about reestablishing control
11 over the Internet and eliminating the ESP exemption. They have to eliminate us to do that. The
12 rest of my testimony and the other UTEX witnesses will demonstrate the basis for my belief.

13 **Q: ARE YOU AWARE OF ANY INSTANCE WHERE AT&T HAS ALREADY BEEN**
14 **COMPENSATED FOR SOME OF THE TRAFFIC IN ISSUE IN THIS CASE?**

15 A: Yes. One of our customers largest customer was a company called Vartec. AT&T
16 directly sought payment by Vartec in Vartec's bankruptcy proceeding for some of the same
17 traffic for which AT&T is seeking a money judgment in this case. AT&T and Vartec settled and
18 compromised on this claim which was worth somewhere between 19 and 35 million dollars. My
19 customer had for a long time been seeking indemnification from Vartec for any charges
20 resulting from Vartec passing non-eligible ESP traffic. Vartec refused to indemnify, and
21 ultimately, this customer "fired" Vartec as a customer.³¹

³¹ If anything, UTEX and UTEX's customer should be awarded a collections fee in that it is the express anti-fraud policies of our business dealings which allowed AT&T to be able to "find out" that Vartec was the bad actor.

1 **Q: HAS AT&T SOUGHT TO RECOVER MULTIPLE RECOVERY FOR ANY**
2 **OTHER TRAFFIC THAT IS INVOLVED IN THIS CASE?**

3 A: Yes. AT&T has sued one of our customers in Missouri for payment of access charges
4 covering traffic in many states, including Texas. The case has been abated pending resolution by
5 the FCC of a primary jurisdiction referral over whether that customer is subject to access charges
6 under 47 C.F.R. 69.5, or is exempt because of its ESP status. The name of our customer is highly
7 sensitive confidential. The pleadings in the Missouri and FCC cases, however, are public. Again,
8 AT&T is trying to receive payment of access charges from this third party and again from
9 UTEX, for the same call and the same minute.

10 AT&T also participated in bankruptcy proceedings in which another one of our
11 customers was expressly found to be an ESP and exempt from access charges. This customer's
12 ESP/access exempt status was once again confirmed expressly by the same judge in September
13 of this year.

14 **Q: HAS AT&T CLAIMED THAT THERE ARE IXCs ROUTING TRADITIONAL**
15 **TELEPHONE TRAFFIC OVER UTEX'S NETWORK FOR TERMINATION ON AT&T'**
16 **NETWORK?**

17 A: Yes. The most recent such claim was made on September 4, 2007 on page 9 of AT&T's
18 "Motion to Enforce." AT&T refers to "the interexchange carriers who are avoiding payment of
19 the switched access rates that the FCC and the Texas Legislature have established are the lawful
20 rates to be charged for switched access service." There are other instances.

21 **Q: DOES UTEX HAVE ANY IXC CUSTOMERS?**

1 A: No. Nor do we serve or purposefully support traffic that meets all the criteria stated by
2 the FCC in the *AT&T Declaratory Ruling* for application of access charges notwithstanding any
3 IP transport.

4 **Q: HAS AT&T EVER IDENTIFIED AN IXC IT CLAIMS IS MISROUTING**
5 **TRAFFIC THROUGH UTEX's NETWORK?**

6 A: Our written discovery requested that very information. AT&T did not name a single
7 name. During other communications with AT&T they have identified Vartec, AT&T and MCI.
8 Mr. Dobbins also stated in his deposition that AT&T was not investigating UTEX or any legacy
9 IXC which it thinks might using UTEX. I already noted that AT&T has settled with Vartec;
10 AT&T obviously has control of its own routing and can make sure its Legacy Suppliers do not
11 use UTEX. UTEX has no current relationship with MCI.

12 **Q: IF THERE WAS SUCH TRAFFIC WOULD AT&T BE ENTITLED TO ACCESS**
13 **CHARGES FOR ITS PART OF THE ACCESS SERVICE IT PROVIDES?**

14 A: Yes, but AT&T could not look to us for payment. The FCC so held in footnote 92 of the
15 *AT&T Declaratory Ruling*. The IXC is responsible. In that instance both UTEX and AT&T
16 would be engaged in joint provision of access service, and each would be entitled to payment
17 from the IXC. Neither access service provider could look to the other for payment. For this
18 reason, even if what AT&T claims is true (which it is not), the IXC would be an indispensable
19 party to this case. The only way UTEX could be held liable is through some joint and several
20 liability theory outside of contract principles. UTEX would immediately seek to join any IXC
21 AT&T does name as a party to this case and seek recovery of both the amount for AT&T and an
22 amount to pay for UTEX's access charges as well.

43	Do §§ 253 and/or 257 of the Communications Act prohibit AT&T from assessing access charges on UTEX when it routes Internet traffic to AT&T for termination?
44	Does § 157 of the Communications Act prohibit AT&T from assessing access charges on UTEX when it routes Internet traffic to AT&T for termination?
45	Do PURA §§ 52.108(3), 55.003(c), 55.005 and 55.006 prohibit AT&T from assessing access charges on UTEX when it routes Internet traffic to AT&T for termination?
39	Are AT&T's claims barred because its interpretation would render the contract unconscionable and deprive UTEX of its benefit of the bargain?
47	Since the provision that there is no compensation for ESP traffic was negotiated by the parties, can the Commission give it a limiting construction that would result in access compensation for ESP traffic without considering the negotiating history and the intent of the parties?
48	Did the parties intend that there would be "no compensation" as between SWBT and WCC for traffic to or from ESPs without exception?
49	Are there any exceptions to the ESP "no compensation" provision?
41	If all of UTEX's customers are ESPs entitled to the "ESP Exemption," does the ICA allow AT&T to assess access charges upon UTEX?
46	Are AT&T's charges consistent with the WCC Arbitration Award, which treats ESPs as end users and ESP traffic as local (and non access) traffic?
40	Does the ICA prohibit UTEX from acting as a wholesale provider of telecommunications services to non-carriers that use UTEX's services to in turn provide enhanced/information services (including but not limited to VoIP) to users?
42	Does the ICA prohibit UTEX from providing wholesale telecommunications service to "intermodel" providers that do not assess per message or per minute charges for voice capabilities, even when the voice session communicates with the PSTN?

1
2 **Q: HOW ARE YOUR ICA AND BUSINESS PLAN UNIQUE?**

3 A: I answer that question in the Part 2 of my testimony. We developed a service and a
4 business plan that implements the fundamental premise that we will not pay AT&T for any
5 interconnection-related feature, function or service.³² including transport and termination, and we

³² We recognize and do not oppose cost sharing of facilities so long as the FCC's rules on cost responsibility are honored, and the price meets the cost based standard set out in the Act.

1 will not ask for or expect any payment from AT&T or any other CLEC, CMRS provider or IXC.
2 All of our revenues come entirely from our new technology customers; we do not in any way
3 rely on inter-carrier compensation in any form. That is what the FCC said it wanted the industry
4 to move toward several years ago. That is what this Commission said it preferred as well. So that
5 is what we have done.

6 To accomplish the goal of earning our living on revenues from customers rather than
7 other carriers, we relied on and implemented two of the several unique terms in the ICA: the "no
8 compensation" part and the "to or from and ESP" part.

9 **Q: WAS THE "NO COMPENSATION" PROVISION MUTUALLY NEGOTIATED**
10 **BETWEEN WCC AND SBC?**

11 A: Yes. It was the result of compromise on both sides. Each side gave consideration,
12 measured in various ways. SBC completely knew what the words meant. It was clear from the
13 negotiations and the words that the negotiated amendment was not intended to lead to a result
14 where the last sentence of Attachment 12 § 1.2 was to be construed to mean that only "local"
15 ESP traffic was "local" and ESP traffic that happens to involve an end point outside the same
16 local calling area was not treated as local. That would be insane because the whole point of the
17 ILECs' argument, and the FCC's decisions in the *ISP Declaratory Ruling* and the *ISP Remand*
18 *Order* is that ESP traffic – especially traffic involving the Internet – is by definition both
19 interstate and InterLATA if you look at the end-points.

20 Yet access does not apply to either the ESP or either of the involved LECs. Similarly the
21 belt-and-suspenders additional provision we added through § 1.4.1 that uses a phrase [no
22 compensation] that is different than "bill and keep" was purposefully worded to make it clear
23 that it was broad and reciprocal. I can assure you that I told SBC what the words meant and what

1 my intentions were. I told them it would apply to VoIP. They agreed. This was part of the
2 bargain.

3 AT&T now wants to just read both the last sentence in § 1.2 and § 1.4.1 completely out
4 of the agreement, and pretend that the parties never dealt with ISP/ESP issues at all. You simply
5 cannot reach that result if you do any analysis of the WCC case and the voluntary amendment,
6 especially if you consider the intent of the parties like UTEX believes is required.

7
8 Below is a pictorial timeline showing the Exhibits that relate to the Overarching Issues
9 Including Waiver.

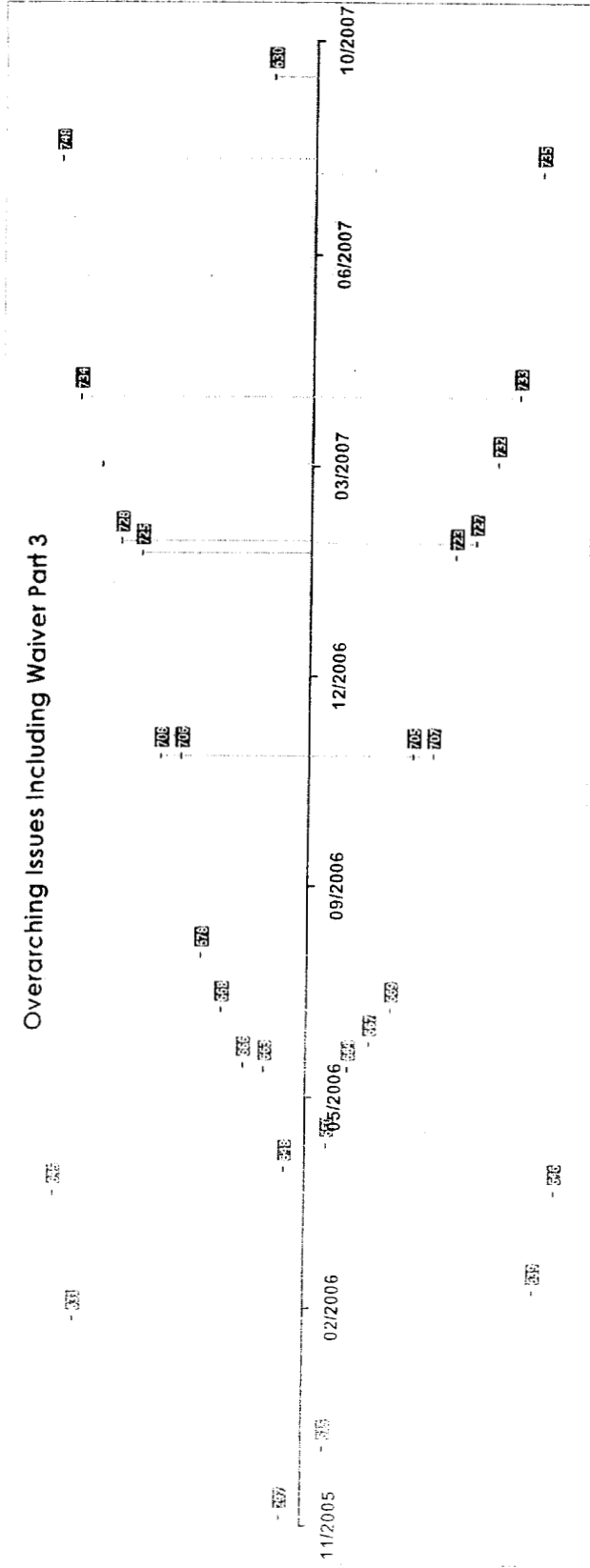
Overarching Issues Including Waiver Part 1

[illegible]

Overarching Issues Including Waiver Part 2

[illegible]

Overarching Issues Including Waiver Part 3



1 SECTION 7 CPN ISSUES

50 What constitutes valid or adequate CPN under the ICA?

Did UTEX deliver valid originating CPN on at least 90% of all calls it terminated on AT&T Texas's network during each period covered by the AT&T Texas CABs bills wherein the intraLATA access charges have been assessed for No-CPN traffic?

What amount does UTEX owe AT&T Texas, if any, for failure to deliver valid or adequate CPN on at least 90% of all calls terminated to AT&T Texas's network?

51 Does the ICA define CPN? If so, what is that definition?

52 If the ICA defines CPN, is that definition ambiguous? If so, what was the intention of the parties at the time of contract formation?

53 Do the applicable SS7 standards provide that 8YY numbers are not acceptable content for the CPN address field?

54 Do the applicable SS7 standards provide that the information populated in the CPN address field can and must be only 10 digits and cannot include a country code?

55 Do the applicable Telcordia releases related to AMA billing methods provide that 8YY numbers are not acceptable content for the SS7 ISUP IAM CPN address field?

56 Do the applicable Telcordia releases related to AMA billing methods provide that the information populated in the SS7 ISUP IAM CPN address field can and must be only 10 digits and cannot include a country code?

57 Do the applicable Telcordia releases related to AMA billing methods provide that the information populated in the SS7 ISUP IAM CPN address field must be a NANP-issued geographic-based E.164 number that is active in the LERG?

58 Does UTEX have an ICA obligation to provide CPN if its customer does not provide a calling number that can be used to populate the CPN parameter in the ISUP IAM for traffic handed to AT&T Texas?

59 What "CPN" should be used under the ICA if there is more than one potential "originating party number"?

60 Does the ICA specify what "CPN" should be used if the calling party has an address that is not an E164 address, such as an email address, SIP address or IM Screen Name?

61 What is the result under the ICA if UTEX's records show CPN was sent and AT&T Texas's records show no CPN was received?